IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 27, 2007 Session

QUALCOMM INCORPORATED v. LOREN L. CHUMLEY, COMMISSIONER OF REVENUE, STATE OF TENNESSEE

Appeal from the Chancery Court for Davidson County
No. 04-1127-IV Richard Dinkins, Chancellor

No. M2006-01398-COA-R3-CV - Filed September 26, 2007

In this appeal we consider application of Tennessee's sales and use tax on telecommunications as "telecommunications" was formerly defined. *See* T.C.A. § 67-6-102(a)(32) (2003). The taxpayer plaintiff-appellee provides a service which allows its customers (commercial trucking companies) to locate and determine the status of individual vehicles as well as communicate with its drivers. The defendant-appellant Commissioner of Revenue determined that this service constituted taxable "telecommunications" during the audit period in question. The taxpayer filed this suit in the Chancery Court for Davidson County seeking a refund. The chancellor below granted the taxpayer's motion for summary judgment and denied the Commissioner's cross-motion. The Commissioner appeals this decision. Applying the "true object" test as it has been developed by prior decisions of this Court rendered in the context of telecommunications taxation, we agree with the court below that telecommunication was not the true object or primary purpose of the service at issue. Accordingly, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

WALTER C. KURTZ, SP. J., delivered the opinion of the court, in which DAVID R. FARMER and HOLLY M. KIRBY, JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, Richard H. Sforzini, Jr., Assistant Attorney General, and Jonathan N. Wike, Assistant Attorney General, for the appellant, Loren L. Chumley, Commissioner of Revenue.

Michael D. Sontag and Stephen J. Jasper, Nashville, Tennessee, for the appellee, Qualcomm Incorporated.

OPINION

This case arises from a dispute concerning sales and use taxes paid by the plaintiff-appellee, Qualcomm Incorporated (Qualcomm), to the defendant-appellant, the Commissioner of the

Tennessee Department of Revenue (Commissioner), for a specified audit period – the calendar months ending May 31, 2002 and June 30, 2002. Qualcomm seeks a refund of sales taxes attributable during these months to its OminiTRACS information management service.

On March 11, 2004, the Commissioner, acting pursuant to T.C.A. § 67-1-1802(c)(2), granted a written waiver that allowed Qualcomm to file suit in chancery court without first requesting from the Commissioner a refund of the taxes that had been paid. Qualcomm timely filed this action on April 15, 2004 in the Chancery Court for Davidson County, *see* T.C.A. § 67-1-1801 *et seq.*, and the case came before the trial court on the parties' cross-motions for summary judgment.

The issue for the court below was the same as that presented on appeal: whether Qualcomm's OmniTRACS is a taxable telecommunications service within the meaning of T.C.A. § 67-6-102(a)(32) (2003). That court concluded that OmniTRACS did not fit within the scope of the statute. Thus, it denied the Commissioner's motion for summary judgment and granted Qualcomm's. The Commissioner appeals, arguing that the trial court's decision was erroneous as a matter of law. We affirm.

I.

Qualcomm is a Delaware corporation which has its principal place of business in San Diego, California. It is authorized to do business in Tennessee and has several Tennessee customers engaged in commercial trucking.

Both Qualcomm and the Commissioner agree that Qualcomm's OmniTRACS service "is a means by which customers gather information about the vehicles within their fleets[.]" Customers contract for this service to enable their fleet management centers or fleet dispatchers to track and manage their vehicles more efficiently. Use of OmniTRACS requires that a Mobile Communications Device (MCD) be installed in the vehicles of a customer's fleet. At the time relevant to this appeal, Qualcomm leased transponder space on two satellites which served as the link between individual trucks and Qualcomm's Network Operations Center (NOC). One of these satellites sent and received data while the other triangulated the vehicle's location. The information collected from each truck includes its "position or location, the vehicle[] identification number, the date and time stamp[,] and [its] latitude and longitude."

Qualcomm collects this data regarding customer vehicles and processes it at its NOC. Another feature of the OmniTRACS service allows text messages to be sent to and from vehicles by way of the NOC. Information as to a vehicle's location is automatically ascertained at regular intervals established by the customer – typically each hour on the hour – and also anytime a driver sends a text message. (Furthermore, it is possible for a customer to specifically request the location of an individual vehicle at any given time through a procedure referred to as initiating a "ping.") After being processed at the NOC, this data is sent to a "queue" where it is accessible to each customer through its own internet connection. Special software purchased for a one-time fee from Qualcomm and a password are required to log onto its system. As the individual customer must

initiate the query to the NOC, it is the customer who determines how frequently this stored information is accessed.

Qualcomm does not, except in a few special instances,[1] provide the landline or internet service between the customer and the NOC. Rather, the customer is left to access the NOC computer in much the same manner as any website would be visited. The data provided by OmniTRACS allows customers to in turn generate their own reports and evaluations for use in improving operational efficiency.

In conjunction with this vehicle location service, Qualcomm's customers are secondarily provided a messaging component. Like its vehicle positioning feature, the OmniTRACS service's text messaging capability operates through the same "store-and-forward" technology that is used with most of the internet, including e-mail systems. According to the record, between six and ten million messages are processed by Qualcomm's NOC each day. Text messages in OmniTRACS may be either "macro" messages, which are templated or formulaic communications sent with little to no addition of information by the sender, or they may be "free form" text messages, which are messages actually composed by the sender. The Commissioner admitted in the court below that the "vast majority of the messages . . . processed by the NOC" are "macro" messages. She further admitted that OmniTRACS is "seldomly . . . used as a means of 'communication' through back-and-forth free form messages." These "macro" messages are sent by the pressing of numbers (1 through 99) which correspond to commonly and routinely used shipping phrases. Whenever any message is sent from a vehicle, the NOC processes the data and, before forwarding it to the customer's queue, adds such pertinent information as the vehicle's location and the time of the message. Messages may also be sent to vehicles from the customer's fleet management center, and, once received by the destination vehicle or vehicles, a confirmation receipt is sent back to the NOC and then to the customer's queue.

In the court below, the Commissioner agreed with Qualcomm that its "OmniTRACS service is principally used to provide information regarding the location and status of each vehicle in the customer's fleet." Similarly, the parties agreed that the "majority of information which flows through the OmniTRACS service relates to the vehicle's status and position." The Commissioner even admitted that "[f]rom Qualcomm's customer's perspective, the primary purpose or use of the OmniTRACS service is to determine the location of the vehicles" and that "the location/positioning feature and the macro messaging features of the OmniTRACS system are the primary reasons why Qualcomm's customers contracted for this service." Finally, both sides agreed below that the "OmniTRACS service does not replace the driver's personal cell phone, in that the service is seldomly, if ever, used to carry on a conversation between the truck driver and the customer's fleet management center." Conversations are instead still typically conducted by means of a driver's cellular phone.

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[1] The record indicates that Qualcomm did arrange connections to the NOC for a few customers, but it billed separately for this and did not mark up the price. These arrangements are not important for consideration of this case, and the Commissioner's argument does not rely upon them.

II.

"The standard for reviewing a grant of summary judgment by a trial court is de novo without a presumption that the trial court's conclusions are correct." *Butterworth v. Butterworth*, 154 S.W.3d 79, 81 (Tenn. 2005) (citing *Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn. 2000)). The inquiry is itself entirely a question of law. *Messer Griesheim Indus., Inc. v. Cryotech of Kingsport, Inc.*, 131 S.W.3d 457, 462 (Tenn. Ct. App. 2003).

"Summary Judgment is appropriate where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002) (quoting Tenn. R. Civ. P. 56.04); *see Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). The party seeking summary judgment bears the burden of persuading the Court that it has met these requirements. *Godfrey*, 90 S.W.3d at 695 (citations omitted). "Summary judgment is appropriate only when the facts and inferences permit a reasonable person to reach only one conclusion." *Doe v. HCA Health Svs. of Tennessee, Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001) (citations omitted).

"If a factual dispute exists, we must then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial." *Pendleton v. Mills*, 73 S.W.3d 115, 122 (Tenn. Ct. App. 2001) (citations omitted); *see Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). "The court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and, if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted." *Frame v. Davidson Transit Org.*, 194 S.W.3d 429, 434 (Tenn. Ct. App. 2005) (citations omitted). "Summary judgments are proper in virtually any civil case that can be resolved on the basis of legal issues alone . . . [but they are not] appropriate when genuine disputes regarding material facts exist." *Pendleton*, 73 S.W.3d at 121 (citations omitted).

III.

The task for this Court is to determine whether the court below correctly applied the law to the undisputed facts that had been established in consideration of the parties' cross-motions for summary judgment. In construing a statute, "the plain import of the language of the act is to be given effect[.]" *Int'l Harvester Co. v. Carr*, 466 S.W.2d 207, 260 (Tenn. 1971) (citing *United Inter-Mountain Telephone Co. v. Moyers*, 221 Tenn. 246, 426 S.W.2d 177 (1968)). It is well settled in this state, however, that "tax statutes are to be liberally construed in favor of the taxpayer and strictly construed against the taxing authority." *White v. Roden Elec. Supply Co.*, 536 S.W.2d 346, 348 (Tenn. 1976) (citing *Memphis Peabody Corp. v. MacFarland*, 211 Tenn. 384, 365 S.W.2d 40 (1963)); *see Steele v. Industrial Dev. Bd.*, 950 S.W.2d 345, 348 (Tenn. 1997); *Covington Pike Toyota, Inc. v. Cardwell*, 829 S.W.2d 132, 135 (Tenn. 1992); *Memphis St. Ry. v. Crenshaw*, 155

Tenn. 536, 55 S.W.2d 758, 759 (1933); *SunTrust Bank v. Johnson*, 46 S.W.3d 216, 224 (Tenn. Ct. App. 2000).

"Courts may not extend by implication the right to collect a tax 'beyond the clear import of the statute by which it is levied.'" *American Airlines, Inc. v. Johnson*, 56 S.W.3d 502, 504 (Tenn. Ct. App. 2000) (quoting *Boggs v. Crenshaw*, 157 Tenn. 261, 7 S.W.2d 994, 995 (1928)). Thus, "[w]here there is doubt as to the meaning of a taxing statute, the doubt must be resolved in favor of the taxpayer." *Memphis Peabody Corp.*, 365 S.W.2d at 43 (citing *Commercial Standard Ins. Co. v. Hixson, County Court Clerk et al.*, 175 Tenn. 239, 242, 133 S.W.2d 493 (Tenn. 1939)); *see also Carl Clear Coal Corp. v. Huddleston*, 850 S.W.2d 140, 147 (Tenn. Ct. App. 1992).

A. Tennessee Telecommunications Taxes

At the time governing the taxes paid in this case the statute relied upon by the Commissioner defined "telecommunications" as follows:

> (A) "Telecommunications" means communication by electric or electronic transmission of impulses;
>
> (B) "Telecommunications" includes transmission by or through any media, such as wires, cables, microwaves, radio waves, light waves, or any combination of those or similar media;
>
> (C) Except as provided in subdivision (a)(32)(D), "telecommunications" includes, but is not limited to, all types of telecommunication transmissions, such as telephone service, telegraph service, telephone service sold by hotels or motels to their customers or to others, telephone service sold by colleges and universities to their students or to others, telephone service sold by hospitals to their patients or to others, WATS service, paging service, and cable television service sold to customers or to others by hotels or motels;
>
> (D) "Telecommunication" does not include public pay telephone services, television or radio programs which are broadcast over the airwaves for public consumption, coaxial cable television (CATV) which is offered for public consumption, private line service, or automatic teller machine (ATM) service, wire transfer or other services provided by any corporation defined as a financial institution under § 67-4-804(a)(9), unless the company separately bills or charges its customers for specific telecommunication services rendered[.]

T.C.A. § 67-6-102(a)(32) (2003).

The audit period at issue here extended from May 1, 2002 to June 30, 2002 and was governed by the definition of "telecommunications" quoted above. The General Assembly has subsequently made substantial changes to this definition of "telecommunications," *see* T.C.A. § 67-6-102(46) (2006),[2] but this revised definition is not implicated by the current appeal.[3]

B. The "True Object" Test

1. The "True Object" Test Generally

Recognizing that undertakings do not always fit clearly and indisputably within the discrete categories contemplated by taxation laws, the courts of this state have developed a method whereby judicial inquiry is made into the "primary purpose" or "true object" of the activity or business at issue. For instance, in deciding whether a gondola and chair lift at the 1982 World's Fair in Knoxville constituted a means of transportation or rather an amusement ride, our Supreme Court examined the facts surrounding its design and use to determine its primary function. *Sky Transpo, Inc. v. City of Knoxville*, 703 S.W.2d 126, 129 (Tenn. 1985). Although Justices Harbison and Drowota disagreed with the Court's ultimate conclusion that the gondola and lift did not constitute a taxable amusement, they did not take issue with the majority's methodology. *See id.* at 132-33 (Harbison, J., concurring in part and dissenting in part).

Likewise, in *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405 (Tenn. 1976), the Supreme Court declined to extend the sales tax on tangible personal property to the purchase of computer programs. *See id.* at 408. The Court concluded that the transfer of the tangible instantiations of the programs (i.e., magnetic tapes and punch cards) was "merely incidental" to the true object of the sale, which was the transfer of information, an intangible. *Id.* at 407.

In a subsequent case, the Court characterized this prior holding by stating: "[T]he basis for the tax assessment [in *Commerce Union*], the tangible personal property – the tapes and cards – was not a 'crucial element' of the true object of the transactions, the intangible information." *Thomas Nelson, Inc. v. Olsen*, 723 S.W.2d 621, 622 (Tenn. 1987) (citing *Commerce Union*, 538 S.W.2d at 407). The Court in that case, however, rejected the argument of the taxpayer that various advertizing design models[4] were simple drawings and sketches used by the advertizer to convey the creative idea to the client. *Thomas Nelson*, 723 S.W.2d at 623. Distinguishing *Commerce Union*, the Court concluded that these advertizing models were "more than merely incidental by-products to the purchase of intangible intellectual property" since they "were inherently related to the commissioned advertizing ideas [and thus they] were the very embodiment of the ideas." *Thomas Nelson*, 723 S.W.2d at 624. According to the Court, the models were better viewed as analogous to the celluloid

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[2] Such changes were first enacted in 2004. *See* 2004 Tenn. Pub. Acts Ch. 782 (H.B. 3479).

[3] We express no other opinion as to the effect or meaning of these amendments in the law.

[4] "In the jargon of the advertizing industry," the Court said, "the tangible personal property acquired by Taxpayer included layouts, keylines, chromalins, camera-ready art, and mock-ups." *Thomas Nelson*, 723 S.W.2d at 623.

film upon which movies were once captured and which had been held to be a tangible, taxable product by the Court many years earlier in *Crescent Amusement v. Carson*, 187 Tenn. 112, 213 S.W.2d 27, 29 (1948).

2. The "True Object" Test in the Context of Telecommunications

The same true object test that was applied in the above evaluations of the terms "amusement" and "tangible personal property" is likewise not foreign to inquiries into whether an activity is a taxable "telecommunication" as that term is used in Tennessee's tax statutes. Indeed, it has been applied in a trio of cases determining the reach of this state's telecommunications tax.

The first of these cases, *Equifax Check Servs., Inc. v. Johnson*, 2000 WL 827963 (Tenn. Ct. App. June 27, 2000), involved the Commissioner's attempt to assess telecommunications sales taxes against Equifax for check approval services it provided to merchants. This Court's opinion described the operation of Equifax's services in detail:

> In a typical transaction, the telecommunication began and ended at the merchant's point-of-sale terminal. The merchant was responsible for entering certain identifying information into its point-of-sale device. The point-of-sale device's modem then transmitted the information to Equifax over telephone lines owned by third-party carriers. In most cases, the merchant's modem contacted Equifax by dialing a 1-800 number. Equifax provided the 1-800 number to its merchants, and the third-party carrier billed Equifax for use of the number. In some cases, rather than using a 1-800 number, Equifax or the merchant leased a dedicated telephone line from a third-party provider. In the small remainder of cases, the merchant communicated with Equifax by using an existing telecommunication network provided by a third-party vendor, such as American Express, MasterCard, or Visa.
>
> The third party's telephone lines transmitted the call from the merchant's modem to one of Equifax's modems at its facility in Tampa, Florida. Usually, the entire transmission took place between the merchant's and Equifax's respective modems. The merchant's modem transmitted the check identifying information to Equifax's modem. Equifax's modem then transmitted this information to its computer system, which had a database containing information about millions of check writers. Based on the information received, Equifax's computer system either approved or declined the check, and it sent an approval or declination code back to the merchant using the same modems and telephone lines that were used to submit the check approval request.
>
> Equifax charged the merchant a fee for its check approval services that was based primarily on a percentage of the check's face amount. Equifax did not itemize its invoices to show telecommunication costs, nor did it separately bill merchants for

> telecommunication costs. Instead, telecommunication costs were considered to be part of Equifax's overhead costs.

Equifax, 2000 WL 827963, at *1.

The Commissioner argued that "because telecommunication services were an essential element of Equifax's check guarantee services, Equifax was furnishing taxable telecommunication services to its Tennessee customers." *Id.* at *2. This Court rejected that argument, holding that the "purpose of the check guarantee services provided by Equifax . . . was to approve or decline checks written by the merchants' customers." *Id.* at *3. Given that "the primary purpose of the services provided by Equifax was not to furnish telecommunication services but, instead, to furnish check guarantee services," the telecommunications tax was inapplicable. *Id.* at *5.

The next examination of Tennessee's telecommunications tax came in *Prodigy Servs. Corp., Inc. v. Johnson*, 125 S.W.3d 413 (Tenn. Ct. App. 2003), *perm. app. denied* (Tenn. Dec. 22, 2003). At issue there was whether the internet program provided by Prodigy fell within the scope of the sales tax. Judge Cantrell, speaking for this Court, described Prodigy's services this way:

> Prodigy furnishes a software program that can be downloaded on the subscriber's personal computer. The program furnishes tax information, computer services, and conversion services. In short, the program allows the subscriber to access information and to perform certain functions through the internet. A command from the subscriber's computer is converted to computer language and transmitted by use of a modem through the subscriber's telephone line to a Prodigy computer somewhere within the state. Some of the desired information or service may come from the local computer or it may involve communicating with Prodigy's main computers in Yorktown Heights, New York. The link between the local computer and the New York computer is through lines leased from common carriers or through services leased from other networks that have their own carrier capabilities or that sub-let to Prodigy the carrier capabilities leased from others. The Prodigy programs provide a link to the internet, which allows the subscriber to send and receive e-mail. Thus, the ability to communicate is an important feature of the Prodigy service.

Id. at 415.

In evaluating Prodigy's services, the Court carefully examined the legislative history surrounding the law setting taxes on telecommunications. It also looked to the distinction made at the federal level between "basic" and "enhanced" communications services. *See id.* at 418-19 (quoting *California v. F.C.C.*, 905 F.2d 1217, 1223 n.3 (9th Cir. 1990)). "[C]ompanies that provide communication services through the use of the [i]nternet[] are not regulated as 'telecommunication service providers.'" *Id.* at 419. The Court then held that "the chancellor was correct in concluding that the Legislature did not intend for the services Prodigy provides to come within the statutory definition." *Id.*

Moreover, the Court concluded that "telecommunications services were not the 'true object' of the Prodigy sale, even if some of the services fit that definition." *Id.* (citing *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405 (Tenn. 1976)). "Although Prodigy's programs allowed their users to communicate through the internet, that capability is one of those enhanced services that does not come within the definition of 'telecommunication services.'" *Id.* Accordingly, Prodigy's services did not fall within the purview of the telecommunications tax.

The third such interpretation by this Court of the statute came last year in *BellSouth Telecommunications, Inc. v. Johnson*, 2006 WL 3071250 (Tenn. Ct. App. Oct. 27, 2006). At issue were various services provided by BellSouth, which were described as follows:

> BellSouth's MemoryCall service is an electronic voice mailbox made available to its customers via computers at BellSouth's facilities. The service is accessible via BellSouth phone service. The MAS+ service includes the same service as MemoryCall, but it offers features enabling subscribers to contact an attendant by dialing "0," to receive pages notifying them of new messages, and to have additional control over messaging, which includes the ability to specify a message as urgent. The Basic Messaging Service affords the subscriber all the features of MAS+, along with features allowing subscribers to exchange information through messaging with other subscribers of MemoryCall, as well as control over future delivery of messages, an extended absence greeting, and guest and home "mailboxes." The Deluxe Messaging Service has all the features of the Basic Messaging Service, but it also provides subscribers with group distribution lists.

Id. at *3.

BellSouth's MemoryCall was deemed not taxable by the Commissioner because it was "little more than [a] basic answering machine service" and thus was not considered in the case on appeal. *Id.* at *1 n.1. This Court had little difficulty in concluding that the true object of the other services in question, however, was to "facilitate, albeit delayed, the transmission and receipt of a telephone communication." *Id.* at *3. "As stated by the trial court, 'the fact that the oral message is held in abeyance in a computer memory does not change the service provided[;] that is, the customer can communicate with a specific person or persons through telephonic means.'" *Id.* Application of the telecommunications tax was therefore proper.

IV.

On appeal in this case, the Commissioner argues that the trial court erred in its application of the law. As will be seen, the Court rejects this contention and agrees with the decision of the chancellor below. The Court does not write on a clean slate in its construction of the term "telecommunications" as used in our taxation statutes since prior panels of this Court have previously expounded upon its meaning and significance. Were matters otherwise, the

Commissioner's arguments might require more detailed consideration, but, given that the law in this area has already been developed, our path is clear.

Having thoroughly analyzed the facts as they were agreed upon by the parties before the trial court, we conclude that the true object or primary purpose of Qualcomm's OmniTRACS service is to determine the location and load status of customer vehicles – that is, to collect data and then make it available to Qualcomm's customers. While the OmniTRACS system undoubtedly contains the ability to transmit "free form" text messages, acquiring this capability is not the principal aim of its purchasers. Nor does the system's capacity for sending "macro" messages transform it into a telecommunications service since these so-called "messages" do little more than allow information concerning a vehicle's status to be combined with information on its location. Even then, these "macro" messages must still be retrieved by the customer. As agreed below, the ability to ascertain a vehicle's location and load status is the primary reason that customers purchase OmniTRACS. The fact that a service might employ, involve, or be accessed by telecommunications, without more, will not transform it into a taxable telecommunications service. *See Prodigy*, 125 S.W.3d at 419; *see also Equifax*, 2000 WL 827963, at *3.

Analogizing the use of OmniTRACS to the placing of a telephone call, the Commissioner contends that the trial court was wrong to conclude that the true object of Qualcomm's services is the provision of information rather than communication services. According to the Commissioner, the purpose of OmniTRACS is merely to transfer messages created by customers. The Commissioner's characterization, however, is belied by the facts to which she agreed before the trial court, including her acknowledgment that OmniTRACS does not serve as a replacement for a driver's cell phone. Indeed, the record reflects that, at least during the tax period at issue, customers purchased this service from Qualcomm mainly so that they might be able to track their vehicles, and OmniTRACS was never primarily used as a means for free-flowing conversations between a customer and its drivers. Similarly, the facts already established contradict the Commissioner's argument on appeal that OmniTRACS is primarily a means of person-to-person communication. It therefore warrants emphasizing that Qualcomm itself, using its own technology, generates information regarding the location of customer vehicles, and this is a key component of what its customers purchase.

Additionally, the Commissioner argues that the trial court misapplied *Prodigy*. According to her reading of that case, the reviewing court must ask who created the information in question. She asserts that, if the taxpayer does not create the information being transmitted, then *Prodigy* does not apply and the service should be considered a form of taxable telecommunications. Even assuming arguendo that this distinction could ever be meaningful, it must be rejected in this case for several reasons. First, a distinction based upon the creator of content cannot trump inquiry into the true object of a potentially taxable service. *See*, *e.g.*, *Sky Transpo*, 703 S.W.2d at 129; *Equifax*, 2000 WL 827963, at *4-5 (applying *Sky Transpo*). Here, that true object is to locate vehicles and determine their status. Second, as previously discussed, the undisputed facts of this case make evident that Qualcomm does in fact generate information apart from the content created by its customers and their drivers. This is, after all, the point of the OmniTRACS service: to locate

vehicles without need for person-to-person communication. Moreover, its vehicle tracking function operates automatically and independently of any message that might be sent by or to a driver. Only when a "free form" message is sent can it be said that information from the customer predominates in importance over information generated by Qualcomm itself, but use of this capability, the parties agree, is relatively rare.

Finally, the Commissioner argues that the trial court's ruling is inconsistent with this Court's recent decision in *BellSouth*. This assertion, however, begins its analysis with the wrong starting point. In *BellSouth*, the services the Commissioner sought to tax possessed telecommunications as their true object ab initio. On those facts, under the totality of the circumstances, this Court concluded that, even though those services involved delays, these delays did not alter the fundamental nature of the service being provided. *BellSouth*, 2006 WL 3071250, at *3 (Tenn. Ct. App. Oct. 27, 2006). This conclusion is particularly compelling since the point of BellSouth's services was, at least in part, to hasten the delivery of messages. In this case, Qualcomm's services are never primarily aimed at providing telecommunications between Qualcomm and its customers. The only aspect of OmniTRACS truly analogous to the services considered in *BellSouth* is its ability to send "free form" text messages, but, as has been stated repeatedly, this is not OmniTRACS' principal feature. Thus, any comparison between the *BellSouth* services and those provided by Qualcomm in the instant case is misplaced.

V.

For the reasons stated above, the Court concludes that the true object or primary purpose of Qualcomm's OmniTRACS service is not – at least as the service has been described throughout this litigation – telecommunications. Qualcomm generates and collects information, which it then stores and which its customers access by means of their own internet connections. The chancellor below therefore correctly applied the law to the undisputed facts of this case. Accordingly, his decision granting summary judgment to Qualcomm and denying the Commissioner's cross-motion is affirmed in all respects.

Costs of this appeal are taxed to the appellant, and this case is remanded for further proceedings not inconsistent with this opinion. Upon remand the trial court shall determine reasonable attorneys' fees and expenses of litigation to be awarded to Qualcomm pursuant to T.C.A. § 67-1-1803(d).

WALTER C. KURTZ, SPECIAL JUDGE